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No. 89-1827

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

SILAS E. COUNTS,
Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Respondent, Burlington Northern Railroad Company, is dissatisfied with the question presented by Petitioner, Silas E. Counts, as that question is not the one addressed by the Montana District Court nor the Ninth Circuit Court of Appeals. The question considered by the Montana District Court and the Ninth Circuit Court of Appeals was as follows:

> Does the Federal Employers Liability Act (FELA), 45 U.S.C. §51, et seq., preempt a state law cause of action for fraudulent inducement of a release of a injured railroad worker's claim under the FELA?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

Respondent is dissatisfied with Petitioner's statement of the case, as follows:

Petitioner did not bring a state law cause of action in Cause No. CV-86-87-H-CCL for "intentional torts". Petitioner brought a cause of action under Count One for fraud, and under Count Two for violation of Montana's Unfair Claims Settlement Practices Act. Petitioner

abandoned Count Two and proceeded with Count One. Count One was a state law cause of action for fraud based upon the alleged fraudulent inducement of the release of Petitioner's FELA claim. Petitioner's representation of "intentional torts" other than a state law cause of action for fraud in the inducement of an FELA release is incorrect.

Additionally, Petitioner states that a jury in May 1990 found the release to be invalid based upon fraud, misrepresentation and inadequate consideration. This is also incorrect. The jury was instructed on fraud, misrepresentation, inadequate consideration and mutual mistake. The jury then returned a general verdict, on the form requested by plaintiff, finding the release to be invalid. Thus, the jury could have found the release to be invalid for reasons other than fraud. No valid conclusions can therefore be reached from the jury's verdict that the railroad engaged in any improper conduct.

Finally, in discussing the petitioner's May 1990 FELA case, he states "...the District Court deducted the amount paid by BN in exchange for the release". No such deduction has yet been made. However, Petitioner has raised no objection to the set-off procedure to be followed by the District Court, but only as to the amount.

PETITIONER'S WRIT FOR CERTIORARI SHOULD BE DENIED AS PETITIONER HAS FAILED TO DEMONSTRATE ANY COMPELLING REASON WHY THIS COURT SHOULD ADDRESS THE QUESTION PRESENTED

The most compelling reason for denying Petitioner's writ is that this Court has already decided the question as presented. In Dice v. Acorn, Canton and Youngstown Railroad Company, 342 U.S. 359 (1952), this Court held that the "validity of releases under the Federal Employers Liability Act raises a federal question to be determined by federal law rather than state law". Id. at 361. After determining that federal law controls, this Court also determined the remedy federal law provides for fraudulently inducing a release of an FELA claim holding:

> A release of rights under the act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release.

Id. at 362.

Thus, certiorari of this case would not serve to foster any of the purposes of Sup.Ct.R.10. The court of appeals simply followed the existing state of the law as previously declared by this Court. Since this issue has previously been decided by this Court and there is consequently no conflict within the

circuits or within the state courts of last resort, there is no basis for granting certiorari.

Further, one of the purposes of the FELA was to provide a uniform set of laws to be applied to railroads operating from state to state in interstate commerce. New York Central Railroad v. Winfield, 244 U.S. 147, 150 (1917). Laws that conflict will be preempted. Id. This Court broadly stated:

> We do not doubt that the Federal Employers Liability Act, supplementing a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the Act. State legislatures, for example, may not intrude into the federal Act's interstate commerce perimeter to destroy uniformity by arbitrarily presuming the renunciation of rights which the Act confers,...

South Buffalo Railroad Company v. Ahern, 344 U.S. 367, 371-72 (1953).

This Court in South Buffalo, again reaffirmed its holding in Dice, Id. at 372.

In the instant case, Congress and this Court have declared that in connection with the release of an FELA claim, the railroads will not be subject to fifty different state laws on fraud with differing elements, standards of proof and remedies. One set of laws will apply

and that law has already been set forth by this Court. The courts, both federal and state, have given uniformity to the law on releases of an FELA claim by following Dice. Again, no conflicts have arisen on this issue.

Additionally, just as this Court has directed in Dice, supra, the Petitioner is pursuing his remedy in the FELA case. Petitioner went to court and a jury voided the release and allowed his FELA damages. Since the jury returned a general verdict, it is unknown why the jury set the release aside.

Petitioner here states that the Court of Appeals recognized that there may be a right or entitlement to some "additional recovery" for fraud, but not by virtue of state law. Yet, the Petitioner in the FELA trial did not attempt to recover any damages other than the standard recoverable FELA damages. The Court of Appeals made it clear that whether Petitioner is entitled "under the FELA or federal common law to any additional recovery is a question not now before us, and we do not address it". Counts v. BN, 896 F.2d 424, 426 (9th Cir. 1990).

In enacting the FELA, Congress made a trade-off between the rights of interstate railroads and employees. Each side gave up something in return for other objectives. Congress gave the railroad workers strict liability in some circumstances and a lesser standard of negligence. Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500 (1957). It took away from the railroad many common law

defenses then available but, in return, the railroads received a comprehensive set of laws for liability to their employees that applied nationwide. New York Central Railroad v. Winfield, 224 U.S. 147 (1917). Railroads will not be subject to different rules in each state. Federal preemption of state laws is always a trade-off and balancing of different interests. The instant case is another example of the balancing of different rights by Congress when enacting a nationwide plan that regulates interstate commerce. Thus, while plaintiff may not get the remedy that he wishes to have, a remedy is provided to him through the FELA.

Finally, Petitioner argues that the practical application of the court of appeals decision will result ir railroads all over the country committing intentional torts upon their employees without fear of any adverse consequences. Petitioner uses a speculative example of a "Peeping Tom" that leads to an employee's arrest. There is absolutely no resemblance between the example given and what occurred in this case. There is no evidence that this has ever occurred. Not only does the Petitioner's claim lack evidentiary support, Petitioner offers no other information to support his allegations of past or current transgressions by railroad employers. This Court should not consider granting certiorari in a case that is not in conflict with any other courts or which has no evidence or information that the problem alleged by Petitioner has or is occurring elsewhere. In fact, the

opposite appears to be true because the law setting forth the remedies for a fraudulently induced release was established in 1952 by this Court. After 1952 few cases addressing this issue have been reported. Of those that have, they are in agreement with this Court's statement of the law in Dice. See, Loose v. Consolidated Rail Corp., 534 F.Supp. 260 (E.D. Penn 1982), aff'd mem., 692 F.2d 749 (3rd Cir. 1982); and, Fournier v. Canadian Pacific Railroad, 512 F.2d 317 (2nd Cir. 1975). Congress also has not seen fit to change the FELA after Dice. All of which indicates there is no "special or important" reason for granting certiorari. Sup.Ct.R.10.

In summary, the Petition for a Writ of Certiorari should be denied. This Court already answered the question presented in 1952. Since this Court has answered the question, there is no conflict among the circuits or highest courts of the states. Since this issue was plainly decided in 1952, it has not been questioned in other cases. Neither has Petitioner provided any support for his broad and baseless allegations of abuse of the system by railroad employers. The decision by the Ninth Circuit was in conformity with this Court's decision in Dice, supra, and Petitioner is pursing his remedy as provided by federal law. Certiorari would serve no purpose in readdressing an issue already decided.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

By_____
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